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Committee on Anti-Dumping Practices
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NOTIFICATION OF LAWS AND REGULATIONS UNDER ARTICLES 18.5 AND 32.6 OF THE AGREEMENTS

INDIA

Supplement

The following communication, dated 24 October 2006, is being circulated at the request of the Delegation of India.

Vide Finance Bill 2006-07. an amendment has been made in India's Customs Tariff Act 1975 in its Section 9A. This is notified for Members' information pursuant to Article 18.5 of the Agreement on Implementation of Article VI of the GATT 1994.

Amendment of Section 9A

In section 9A of the Customs Tariff Act, in sub-section (1), in the Explanation, in clause (c), in sub clause (i), for the words "meant for consumption", the words "destined for consumption" shall be substituted.

Vide India's Customs Notification No. 24/206-Customs (N.T.) dated 1 March 2006, some changes have been made in India's Customs Tariff (Identification, Assessment and collection of Countervailing Duty on Subsidy Articles and for Determination of Injury) Rules 1995. In addition, some amendment have also been made in India's Customs Tariff Act in Section 9 vide Finance Bill 2006-07. These are notified for Members information pursuant to Article 32.6 of the Subsidies and Countervailing Measures Agreement.

Amendment of Section 9

In Section 9 of the Customs Tariff Act, 1975 (hereinafter referred to as the Customs Tariff Act)

(a) in sub-section (1), in the Explanation, in clause (a) for the words "within the territory of the exporting or producing country", the words "in the exporting or producing country or territory" shall be substituted;

(b) after sub-section (7), the following sub-section shall be inserted, namely:

"(7A) Unless otherwise provided, the provisions of the Customs Act 1962 and the rules and regulations made thereunder, relating to the date for determination of rate of duty, non-levy, short-levy, refunds, interest appeals, offences and penalties shall, as far as may be, apply in relation to duties leviable under that Act".

1 March 2006

Notification No. 24/2006 (N.T.)

Customs Tariff (Identification, assessment and collection of countervailing duty on subsidies articles and for determination injury) Amendment Rules 2006

G.S.R. 123(E) - In exercise of the powers conferred by sub-section (2) of section 9 of the Customs Tariff Act, 1975 (51 of 1975), the Central Government hereby makes the following rules to amend the Customs Tariff (Identification, assessment and collection of countervailing duty on subsidies articles and for determination injury) Rules 1995, namely:-

1. Short title and commencement (1) The Rule may be called Customs Tariff (Identification, assessment and collection of countervailing duty on subsidies articles and for determination injury) Amendment) Rules 2006.

(2) They shall come into force on the date of their publication in the Official Gazette.

2. In the said Customs Tariff (Identification, assessment and collection of countervailing duty on subsidies articles and for determination injury) Rules 1995,(herein after referred to as the rules),

in rule 11, in sub-rule (1),-

(a) for clause (a), the clause shall be substituted, "(a) relates to export performance including those illustrated in Annexure III to these rules, or";

(b) the proviso shall be omitted.

3. In the said rules, for rule 12, the following rule shall be substituted, namely;-

"12. Calculation of the amount of the countervailable subsidy

(1) For the purposes of these rules, the amount of countervailable subsidies, shall be calculated in terms of the benefit conferred on the recipient which is found to exist during the investigation period for subsidization

(2) As regards the calculation of benefit to the recipient, the following factors shall apply, namely:-

(a) government provision of equity capital shall not be considered to confer a benefit, unless the investment can be regarded as inconsistent with the usual investment practice (including for the provision of risk capital) of private investors in the territory of the country of origin or export;

(b) a loan by a government shall not be considered to confer a benefit, unless there is a difference between the amount that the firm receiving the loan pays on the government loan and the amount that the firm would pay for a comparable commercial loan which the firm could actually obtain from the market and in that event the benefit shall be the difference between these two amounts;

(c) a loan guarantee by a government shall not be considered to confer a benefit, unless there is a difference between the amount that the firm receiving the guarantee pays on a loan guaranteed by the government and the amount that the firm would pay for a comparable commercial loan in the absence of the government guarantee and in such case the benefit shall be the difference between these two amounts, adjusted for any differences in fees;

(d) the provision of goods or services or purchase of goods by a government shall not be considered to confer a benefit, unless the provision is made for less than adequate remuneration or the purchase is made for more than adequate remuneration; whereas, the adequacy of remuneration shall be determined in relation to prevailing market conditions for the product or service in question in the country of provision or purchase (including price, quality, availability, marketability, transportation and other conditions of purchase or sale).

(3) The amount of the countervailable subsidies shall be determined per unit of the subsidized product exported to India and while establishing this amount the following elements may be deducted from the total subsidy:

(a) any application fee, or other costs necessarily incurred in order to qualify for, or to obtain, the subsidy;

(b) export taxes, duties or other charges levied on the export of the product to India specifically intended to offset the subsidy and in cases where an interested party claims a deduction, he must prove that the claim is justified.

(4) Where the subsidy is not granted by reference to the quantities manufactured, produced, exported or transported, the amount of countervailable subsidy shall be determined by allocating the value of the total subsidy, as appropriate, over the level of production, sales or exports of the products concerned during the investigation period for subsidization.

(5) Where the subsidy can be linked to the acquisition or future acquisition of fixed assets, the amount of the countervailable subsidy shall be calculated by spreading the subsidy across a period which reflects the normal depreciation of such assets in the industry concerned and the amount so calculated which is attributable to the investigation period, including that which derives from fixed assets acquired before this period, shall be allocated as described in sub-rule (4) and, where the assets are non-depreciating, the subsidy shall be valued as an interest-free loan, and be treated in accordance with clause (b) of sub-rule 2 (b) above.

(6) Where a subsidy cannot be linked to the acquisition of fixed assets, the amount of the benefit received during the investigation period shall in principle be attributed to this period, and allocated as described in sub-rule (4), unless special circumstances justify its attribution over a different period.

(7) The designated authority while calculating the amount of subsidy in countervailing duty investigation shall take into account, inter-alia, the guidelines laid down in Annexure IV to these rules.";

4. In the said rules, after Annexure II, the following Annexures shall be added, namely:-

"ANNEXURE III

PART- 1

ILLUSTRATIVE LIST OF EXPORT SUBSIDIES

(a) The provision by governments of direct subsidies to a firm or an industry contingent upon export performance.

(b) Currency retention schemes or any similar practices which involve a bonus on exports.

(c) Internal transport and freight charges on export shipments, provided or mandated by governments, on terms more favourable than for domestic shipments.

(d) The provision by governments or their agencies either directly or indirectly through government-mandated schemes, of imported or domestic products or services for use in the production of exported goods, on terms or conditions more favourable than for provision of like or directly competitive products or services for use in the production of goods for domestic consumption, if (in the case of products) such terms or conditions are more favourable than those commercially available on world markets to their exporters.

Explanation: The term "commercially available" means that the choice between domestic and imported products is unrestricted and depends only on commercial considerations.

(e) The full or partial exemption remission, or deferral specifically related to exports, of direct taxes or social welfare charges paid or payable by industrial or commercial enterprises.

Explanation: For the purpose of this paragraph:

(i) the term "direct taxes" shall mean taxes on wages, profits, interests, rents, royalties, and all other forms of income, and taxes on the ownership of real property;

(ii) the term "import charges" shall mean tariffs, duties, and other fiscal charges not elsewhere enumerated in this note that are levied on imports;

(iii) the term "indirect taxes" shall mean sales, excise, turnover, value added, franchise, stamp, transfer, inventory and equipment taxes, border taxes and all taxes other than direct taxes and import charges;

(iv) "Prior-stage" indirect taxes are those levied on goods or services used directly or indirectly in making the product;

(v) "Cumulative" indirect taxes are multi-stage taxes levied where there is no mechanism for subsequent crediting of the tax if the goods or services subject to tax at one stage of production are used in a succeeding stage of production;

(vi) "Remission" of taxes includes the refund or rebate of taxes;

(vii) "Remission or drawback" includes the full or partial exemption or deferral of import charges.

(f) The allowance of special deductions directly related to exports or export performance, over and above those granted in respect to production for domestic consumption, in the calculation of the base on which direct taxes are charged.

(g) The exemption or remission, in respect of the production and distribution of exported products, of indirect taxes in excess of those levied in respect of the production and distribution of like products when sold for domestic consumption.

(h) The exemption, remission or deferral of prior-stage cumulative indirect taxes on goods or services used in the production of exported products in excess of the exemption, remission or deferral of like prior-stage cumulative indirect taxes on goods or services used in the production of like products when sold for domestic consumption; provided, however, that prior-stage cumulative indirect taxes may be exempted, remitted or deferred on exported products even when not exempted, remitted or deferred on like products when sold for domestic consumption, if the prior-stage cumulative indirect taxes are levied on inputs that are consumed in the production of the exported product (making normal allowance for waste) and the item shall be interpreted in accordance with the guidelines on consumption of inputs in the production process contained in Part - 2 of this Annexure. This paragraph does not apply to value-added tax systems and border-tax adjustment in lieu thereof; the problem of the excessive remission of value-added taxes is exclusively covered by paragraph (g).

(i) The remission or drawback of import charges in excess of those levied on imported inputs that are consumed in the production of the exported product (making normal allowance for waste); provided, however, that in particular cases a firm may use a quantity of home market inputs equal to, and having the same quality and characteristics as, the imported inputs as a substitute for them in order to benefit from this provision if the import and the corresponding export operations both occur within a reasonable time period, not to exceed two years and the item shall be interpreted in accordance with the guidelines on consumption of inputs in the production process contained in Part-2 of this Annexure and the guidelines in the determination of substitution drawback systems as export subsidies contained in Part-3 of this Annexure.

(j) The provision by governments (or special institutions controlled by governments) of export credit guarantee or insurance programmes, of insurance or guarantee programmes against increases in the cost of exported products or of exchange risk programmes, at premium rates which are inadequate to cover the long-term operating costs and losses of the programmes.

(k) The grant by governments (or special institutions controlled by or acting under the authority of governments) of export credits at rates below those which they actually have to pay for the funds so employed (or would have to pay if they borrowed on international capital markets in order to obtain funds of the same maturity and other credit terms and denominated in the same currency as the export credit), or the payment by them of all or part of the costs incurred by exporters or financial institutions in obtaining credits, in so far as they are used to secure a material advantage in the field of export credit terms. Provided, that if a country is a party to an international undertaking on official export credits to which at least twelve original World Trade organization Members are parties as of 1 January 1979 (or a successor undertaking which has been adopted by those original Members), or if in practice a country applies the interest rates provisions of the relevant undertaking, an export credit practice which is in conformity with those provisions shall not be considered an export subsidy prohibited by these rules.

(l) Any other charge on the public account constituting an export subsidy in the sense of Article XVI of GATT 1994.

PART-2

GUIDELINES ON CONSUMPTION OF INPUTS IN THE PRODUCTION PROCESS

I

1. Indirect tax rebate schemes can allow for exemption, remission or deferral of prior-stage cumulative indirect taxes levied on inputs that are consumed in the production of the exported product (making normal allowance for waste). Similarly, drawback schemes can allow for the remission or drawback of import charges levied on inputs that are consumed in the production of the exported product (making normal allowance for waste).

2. The Illustrative List of Export Subsidies in Part 1 of Annexure III of these rules makes reference to the term "inputs that are consumed in the production of the exported product" in paragraphs (h) and (i). Pursuant to paragraph (h), indirect tax rebate schemes can constitute an export subsidy to the extent that they result in exemption, remission or deferral of prior-stage cumulative indirect taxes in excess of the amount of such taxes actually levied on inputs that are consumed in the production of the exported product. Pursuant to paragraph (i), drawback schemes can constitute an export subsidy to the extent that they result in a remission or drawback of import charges in excess of those actually levied on inputs that are consumed in the production of the exported product. Both paragraphs stipulate that normal allowance for waste must be made in findings regarding consumption of inputs in the production of the exported product.

II

1. Inputs consumed in the production process are inputs physically incorporated, energy, fuels and oil used in the production process and catalysts which are consumed in the course of their use to obtain the exported product. In examining whether inputs are consumed in the production of the exported product, as part of a countervailing duty investigation pursuant to these rules, the designated authority should proceed on the following basis, namely:-

(1) Where it is alleged that an indirect tax rebate scheme, or a drawback scheme, conveys a subsidy by reason of over-rebate or excess drawback of indirect taxes or import charges on inputs consumed in the production of the exported product, the designated authority should first determine whether the government of the exporting country has in place and applies a system or procedure to confirm which inputs are consumed in the production of the exported product and in what amounts. Where such a system or procedure is determined to be applied, the designated authority should then examine the system or procedure to see whether it is reasonable, effective for the purpose intended, and based on generally accepted commercial practices in the country of export. The designated authority may it necessary if he considers carry out certain practical tests in order to verify information or to satisfy themselves that the system or procedure is being effectively applied.

(2) Where there is no such system or procedure, where it is not reasonable, or where it is instituted and considered reasonable but is found not to be applied or not to be applied effectively, a further examination by the exporting country based on the actual inputs involved would need to be carried out in the context of determining whether an excess payment occurred. If the designated authority considers it necessary, a further examination would be carried out in accordance with sub-paragraph 1 above.

2. The designated authority should treat inputs as physically incorporated if such inputs are used in the production process and are physically present in the product exported. An input need not be present in the final product in the same form in which it entered the production process.

3. In determining the amount of a particular input that is consumed in the production of the exported product, a "normal allowance for waste" should be taken into account, and such waste should be treated as consumed in the production of the exported product. The term "waste" refers to that portion of a given input which does not serve an independent function in the production process, is not consumed in the production of the exported product (for reasons such as inefficiencies) and is not recovered, used or sold by the same manufacturer.

4. The designated authority's determination of whether the claimed allowance for waste is "normal" should take into account the production process, the average experience of the industry in the country of export, and other technical factors, as appropriate. The designated authority should bear in mind that an important question is whether the authorities in the exporting country have reasonably calculated the amount of waste, when such an amount is intended to be included in the tax or duty rebate or remission.

PART-3

GUIDELINES IN THE DETERMINATION OF SUBSTITUTION DRAWBACK SYSTEMS AS EXPORT SUBSIDIES

I

Drawback systems can allow for the refund or drawback of import charges on inputs which are consumed in the production process of another product and where the export of this latter product contains domestic inputs having the same quality and characteristics as those substituted for the imported inputs. Pursuant to paragraph (i) of the Illustrative List of Export Subsidies in Part-1 of Annexure III substitution drawback systems can constitute an export subsidy to the extent that they result in an excess drawback of the import charges levied initially on the imported inputs for which drawback is being claimed.

II

1. In examining any substitution drawback system as part of a countervailing duty investigation pursuant to these rules, the designated authority should proceed on the following basis, namely:-

(i) Paragraph (i) of the Illustrative List of Export Subsidies of Part-1 of Annexure III stipulates that home market inputs may be substituted for imported inputs in the production of a product for export provided such inputs are equal in quantity to, and have the same quality and characteristics as, the imported inputs being substituted. The existence of a verification system or procedure is important because it enables the government of the exporting country to ensure and demonstrate that the quantity of inputs for which drawback is claimed does not exceed the quantity of similar products exported, in whatever form, and that there is not drawback of import charges in excess of those originally levied on the imported inputs in question.

(ii) Where it is alleged that a substitution drawback system conveys a subsidy, the designated authority should first proceed to determine whether the government of the exporting country has in place and applies a verification system or procedure. Where such a system or procedure is determined to be applied, the designated authority should then examine the verification procedures to see whether they are reasonable, effective for the purpose intended, and based on generally accepted commercial practices in the country of export. To the extent that the procedures are determined to meet this test and are effectively applied, no subsidy should be presumed to exist. The designated authority may, if he considers necessary, carry

out certain practical tests in order to verify information or to satisfy themselves that the verification procedures are being effectively applied.

(iii) Where there are no verification procedures, where they are not reasonable, or where such procedures are instituted and considered reasonable but are found not to be actually applied or not applied effectively, there may be a subsidy. In such cases a further examination by the exporting country based on the actual transactions involved would need to be carried out to determine whether an excess payment occurred. If the investigating authorities deemed it necessary, a further examination would be carried out in accordance with sub-paragraph (ii) of Part 3 of this Annexure.

(iv) The existence of a substitution drawback provision under which exporters are allowed to select particular import shipments on which drawback is claimed should not of itself be considered to convey a subsidy.

(v) An excess drawback of import charges in the sense of paragraph (i) would be deemed to exist where governments paid interest on any monies refunded under their drawback schemes, to the extent of the interest actually paid or payable.

ANNEXURE IV

GUIDELINES FOR THE CALCULATION OF THE AMOUNT OF SUBSIDY IN COUNTERVAILING DUTY INVESTIGATIONS

A. CALCULATION OF SUBSIDY PER UNIT/AD VALOREM

The calculation of the benefit shall reflect the amount of subsidy found to exist during the investigation period and not simply the face value of the amount at the time it is transferred to the recipient or foregone by the government. Thus, the face value of the amount of the subsidy should be transformed into the value prevailing during the investigation period through the application of the normal commercial interest rate.

The objective of the calculation should be to arrive at the amount of subsidy per unit of production during the investigation period. In the case of consumer products, such as television sets, the appropriate unit would be each individual item. If bulk products, such as fertilizers or chemicals, are involved, it would be appropriate to calculate the subsidy, that is to say, per tonne, or other appropriate unit of measurement. The per unit subsidy can be converted into an ad valorem rate by expressing the per unit subsidy as a percentage of export price. This may be used to establish whether the subsidy amount is de minimis, since this is expressed ad valorem (1% for imports from developed countries; 2 % for developing countries). In certain circumstances, it may also be considered to be appropriate to express the countervailing duty on an ad valorem basis.

B. CALCULATION OF CERTAIN TYPES OF SUBSIDY

(a) Grants

In the case of a grant (or equivalent) where none of the money is repaid, the value of the subsidy should be the amount of the grant corrected for any differences between the point in time of its receipt and the investigation period, i.e. the period in which the production or sales are allocated. Therefore, if the grant is expensed during the investigation period, (that is, its amount is entirely allocated to production or sales during this period), the interest that would have accrued during that

period should normally be added. If however, the grant is allocated over a longer period than the investigation period, the interest may be added as described in section C (a)(ii).

Any lump sum of revenue transferred or foregone (e.g. income tax or duty exemption, rebates, money saved from preferential provision of goods and services or gained from excessive prices for the purchase of goods) should be considered as being equivalent to a grant.

(i) Direct transfer of funds

The amount of subsidy should be the amount received by the company concerned (a subsidy to cover operating losses would fall into this category).

(ii) Tax exemptions

The amount of subsidy should be the amount of tax that would have been payable by the recipient company at the standard applicable tax rate during the investigation period.

(iii) Tax reductions

The amount of subsidy should be the difference between the amount of tax actually paid by the recipient company during the investigation period and the amount that would have been paid at the normal rate of tax.

(The same method should be applied to all other exemptions and reduction of obligation, e.g. import duties, social security contributions, redundancy payments)

(iv) Accelerated depreciation

Accelerated depreciation of assets under a government agreed programme should be considered as a tax reduction. The amount of subsidy should be the difference between the amount of tax that would have been paid during the investigation period under the normal depreciation schedule for the assets concerned, and the amount actually paid under accelerated depreciation. To the extent that the accelerated depreciation results in a tax saving for the company concerned during the investigation period, there is a benefit.

(v) Interest rate subsidies

In the case of an interest rate subsidy, the amount of subsidy should be the amount of interest saved by the recipient company during the investigation period.

(b) <u>Loans</u>

(1) Basic methodology

(i) In the case of a loan from the government (where repayment does take place) the subsidy should be the difference between the amount of interest paid on the government loan and the interest normally payable on a comparable commercial loan during the investigation period.

(ii) A comparable commercial loan would normally be a loan of a similar amount with a similar repayment period obtainable by the recipient from a representative bank operating on the domestic market.

(iii) In this regard, the commercial interest rate should preferably be established on the basis of the rate actually paid by the company concerned on comparable loans from banks. If this is not possible, the investigation should consider the interest paid on comparable loans to companies in a similar financial situation in the same sector of the economy, or, if information on such loans is not available, to any comparable loan made to companies in a similar financial situation in any sector of the economy.

(iv) If there are no comparable commercial lending practices on the domestic market of the exporting country, the interest rate on a commercial loan may be estimated with reference to indicators of the economic situation prevailing at the time, (notably the inflation rate) and the situation of the company concerned.

(v) If all or part of a loan is forgiven or defaulted on, the amount not re-paid should be treated as a grant depending on whether there was a guarantee.

(2) Specific cases

(i) It should be noted that tax deferrals, or the deferral of any other financial obligation, should be considered as interest-free loans and the amount of subsidy calculated as above.

(ii) In the case of reimbursable grants, these should also be considered as interest free loans until they are reimbursed. If they are not reimbursed, in whole or in part, they should be considered as grants rather than interest-free loans from the date on which non-reimbursement is established. From this date, the normal grant methodology should apply. In particular, if the grant is to be allocated over time, such allocation would start on the established date of non-reimbursement. The amount of subsidy should be the amount of the grant, minus any repayments.

(iii) The same approach would apply to contingent-liability loans. To the extent that such loans are given at a preferential rate of interest, the subsidy should be calculated as in paragraph (i). However, if it were to be determined that the loan would not be repaid, it should be treated as a grant from the date on which non-repayment was established. The amount of subsidy should be the amount of the loan, less any repayments.

(c) Loan guarantees

(i) In general, a loan guarantee, by eliminating to some extent the risk of default by the borrower to the lender, will normally enable a firm to borrow more cheaply than would otherwise be the case. If the government provides the guarantee, the fact that loans are obtained at a lower interest rate than would otherwise be the case does not mean there is a subsidy, provided that the guarantee is financed on a commercial basis, since the financing of such a viable guarantee by the company would be assumed to offset any benefit of a preferential interest rate.

(ii) In this situation, it is considered that there is no benefit to the recipient if the fee which it pays to the guarantee programme is sufficient to enable the programme to operate on a commercial basis, i.e. to cover all its costs and to earn a reasonable profit margin. In such a situation, it is presumed that the fee covers the risk element involved in obtaining a lower interest rate. If the guarantee programme is viable during the investigation period as a whole and the recipient has paid the appropriate fee, there is no financial contribution from the government and therefore no subsidy, even if the recipient involved were to default on its loans during the period.

If the scheme is not viable, the benefit to the recipient should be the difference between the fees actually paid and the fees which should have been paid to make the programme viable, or the difference between the amount the firm pays on the guaranteed loan and the amount that it would pay for a comparable commercial loan in the absence of the government guarantee, whichever is the lower.

(iii) In the case of ad hoc guarantees (i.e. not part of a programme), it should first be ascertained whether the fees paid correspond to those charged to other companies in a similar position which benefit from viable loan guarantee programmes. If so, there would normally be no subsidy; if not, the method explained in (ii) above would apply.

(iv) If no fees are paid by the recipient, the amount of subsidy should be the difference between the amount the firm pays on the guaranteed loan and the amount that it would pay for a comparable commercial loan in the absence of the government guarantee.

(v) The same calculation principles would apply to credit guarantees, i.e., where the recipient is guaranteed against credit defaults by its customers.

(d) Provision of goods and services by the government

Principle

(i) The amount of subsidy as regards the provision of goods or services by the government should be the difference between the price paid by firms for the goods or service, and adequate remuneration for the product or service in relation to prevailing market conditions, if the price paid to the government is less than this amount.

Adequate remuneration should normally be determined in the light of prevailing market conditions on the domestic market of the exporting country, and the calculation of the subsidy amount must reflect only that part of the purchases of goods or services which are used directly in the production or sale of the like product during the investigation period.

Comparison with private suppliers

(ii) As a first step, it must be established whether the same goods or services involved are provided both by the government and by private operators. If this is the case, the price charged by the government body would normally constitute a benefit to the extent that it is below the lowest price available from one of the private operators to the company involved for a comparable purchase. The amount of subsidy should be the difference between these two prices. If the company involved has not made comparable purchases from private operators, details should be obtained of the price paid by comparable companies in the same sector of the economy or, if such data is not available, in the economy as a whole and the amount of subsidy should be calculated as above.

Government monopoly suppliers

(iii) If, however, the government is the monopoly supplier of the goods or services involved, they are considered to be provided for less than adequate remuneration if certain enterprises or sectors benefit from preferential prices. The amount of subsidy should be the difference between the preferential price and the normal price.

If the goods and services in question are widely used in the economy, a subsidy will only be specific or conferred on a limited number of persons if there is evidence of preferential pricing to a particular firm or sector. It may be that per unit prices charged vary according to neutral and objective criteria, for example large consumers pay less per unit than small ones, as sometimes happens in the provision of gas and electricity. In such situations, the fact that certain enterprises benefit from more favourable prices than others would not mean that the provision in this case was necessarily made for less than adequate remuneration, provided that the pricing structure in question was generally applied throughout the whole economy, without any preferential prices being given to specific sectors or firms. The amount of subsidy should in principle be the difference between the preferential price and the normal price charged to an equivalent company, according to the normal structure.

(iv) However, if the normal price is insufficient to cover the supplier's average total costs plus a reasonable profit margin (based on sector averages), the amount of subsidy should be the difference between the preferential price and the price which would be required to cover the above costs and profit.

(v) If the government is the monopoly supplier of the goods or services with a specific use, e.g. television tubes, the question of preferential pricing does not arise, and the amount of subsidy should be the difference between the price paid by the firm involved and the price required to cover the supplier's costs and profit margin.

(e) Purchase of goods by government

(i) In a situation where private operators purchase the kind of goods in question as well as the government body, the amount of subsidy should be the extent to which the price paid for the like product by the government exceeds the highest price offered for a comparable purchase of the same goods by the private sector.

(ii) If the company involved has not made comparable sales to private operators, details should be obtained of the price paid by private operators to comparable companies in the same sector of the economy, or, if such data is not available, in the economy as a whole. In such a case, the amount of subsidy should be calculated as above.

(iii) If the government has a monopoly for the purchase of the goods in question, the amount of subsidy as regards the purchase of goods by the government should be the extent to which the price paid for the goods exceeds adequate remuneration. Adequate remuneration in this situation is the average costs incurred by the firm selling the product during the investigation period, plus a reasonable amount of profit, which will have to be determined on a case-to-case basis.

The amount of subsidy should be the difference between the price paid by the government and adequate remuneration as defined above.

(f) Government provision of equity capital

(i) Government provision of equity capital should not be considered as conferring a benefit, unless the investment decision can be regarded as inconsistent with the usual investment practice (including for the provision of risk capital) of private investors in the exporting country concerned.

(ii) Therefore, the provision of equity capital does not of itself confer a benefit. The criterion should be whether a private investor would have put money into the company in the same situation in which the government provided equity. On the basis of this principle, the matter has to be dealt with on a case-to-case basis.

(iii) If the government buys shares in a company and pays above the normal market price for these shares (taking account of any other factors which may have influenced a private investor), the amount of subsidy should be the difference between the two prices.

(iv) As a general rule, in cases where there is no market in freely-traded shares, the government's realistic expectation of a return on the price paid for equity should be considered. In this regard, the existence of an independent study demonstrating that the firm involved is a reasonable investment should be considered the best evidence; if this is not present, the onus should be on the government to demonstrate on what basis it can justify its expectation of a reasonable return on investment.

(v) If there is no market price and the equity injection is made as part of an ongoing programme of such investments by the government, close attention should be paid not just to the analysis of the firm in question, but to the overall record of the programme over the last few years. If the records show that the programme has earned a reasonable rate of return for the government, there should be a presumption that the government is acting according to the usual investment practice of private investors with regard to the case in question. If the programme has not generated a reasonable return, the onus should be put on the government to demonstrate on what basis it can justify its expectation of a reasonable return on investment.

(vi) The existence of a subsidy should be determined by the information available to the parties at the time the equity injection is made. Thus, if an investigation considers an equity injection that was made several years before, the fact that the company has performed less well than expected should not mean that a subsidy exists, provided that the expectation of a reasonable return was justified in the light of the facts know at the time of the provision of equity.

On the other hand, a subsidy might exists even if a reasonable return has been achieved, if at the equity injection the prospect of such a return was so uncertain that no private party would have made the investment.

(vii) In cases where there is no market price for the equity and there is a subsidy and a benefit, i.e., the government has not acted according to the usual investment practice of private investors, all or part of the equity provided must be considered as a grant.

A decision to consider all of the equity a grant should be made only in extreme cases where it is determined that the government had no intention of receiving any return on its investment and was in effect giving a disguised grant to the firm in question.

A decision on what portion of the equity to treat as a grant would depend on how near the government has come to meeting the private investor standard. This determination should be made on a case-to-case basis.

(g) Forgiveness of government-held debt

Forgiveness of debt held by government or government-owned banks relieves a company of its repayment obligations and should therefore be treated as a grant. If the subsidy is to be allocated,

the allocation period should begin at the time of the forgiveness of the debt. The amount of subsidy should be the outstanding amount of the debt forgiveness (including any interest accrued).

C. INVESTIGATION PERIOD FOR SUBSIDY - CALCULATION OF EXPENSE VERSUS ALLOCATION

The amount of subsidy should be established during an investigation period, which should normally be the most recent financial year of the beneficiary enterprise. Although any other period of six months prior to initiation may be used, it is preferable to use the most recent financial year, since this will enable all appropriate data to be verified on the basis of audited accounts.

As many subsidies have effects for a number of years, subsidies granted before the investigation period should also be investigated in order to determine what portion of such subsidy is attributable to the investigation period.

(i) If the subsidy is granted on a per unit basis, for example, an export rebate granted per unit of product, the per unit calculation normally consists of taking the weighted-average value of the rebate over the investigation period;

(ii) Other kinds of subsidy are not readily expressed on a per unit basis, but involve a global sum of money which has to be allocated to each unit of product as appropriate. Two exercises may have to be carried out, in this respect:

- Attribution to the investigation period of a portion of those subsidies granted before the investigation period but whose effects extend over a number of years.

- Allocation of the subsidy amount attributed to the investigation period per unit of the like product. In this case, the appropriate denominator for such allocation has to be selected.

(a) <u>Attribution of a subsidy amount to the investigation period</u>

(i) Many types of subsidy, e.g. tax incentives and preferential loans are recurring and the effect is felt immediately after granting. Thus, the amount granted to the beneficiary can be expensed in the investigation period. The expensed amount should normally be increased by the annual commercial interest rate, to reflect the full benefit to the recipient, on the assumption that the beneficiary would have had to borrow the money at the beginning of the period and repay it at the end.

(ii) For non-recurring subsidies, which can be linked to the acquisition of fixed assets, the total value of the subsidy should be spread over the normal life of the assets. Therefore the amount of subsidy from, for example, a grant (for which it is assumed that it is used by the beneficiary to improve its competitiveness in the long term, and thus to purchase product assets of one kind or another), can be spread over the normal period used in the industry involved for the depreciation of assets. This should normally be done using the straight-line-method. For example, if the normal depreciation period was five years, 20% of the value of the grant should be allocated to the investigation period.

The approach of allocating over time means that non-recurring subsidies granted several years before the investigation period may still be countervailed provided that they still have an effect during the investigation period.

This kind of allocation is equivalent to a series of annual grants, each having en equal amount. In order to determine the benefit to the recipient, the appropriate annual commercial interest rate should be added to each grant, to reflect the benefit of not having to borrow the money on the open market. In addition, in order to reflect the full benefit to the recipient of having a lump sum of money at its disposal from the beginning of the allocation period, the amount of subsidy should be increased by the average amount of interest which the recipient would expect to earn on the non-depreciated amount of total grant over the whole period of allocation.

(iii) As an exception to (ii), non-recurring subsidies which amount to less than 1% ad valorem may normally be considered to be expensed, even if they are linked to the purchase of fixed assets.

(iv) In the case of recurring subsidies linked to the acquisition of fixed assets, e.g. import duty exemptions on machinery, which date back to before the investigation period, the benefits accruing from previous years within the depreciation period should be taken into account and the appropriate amount attributed to the investigation period.

(v) In addition, recurring subsidies granted in large, concentrated amounts prior to the investigation period, may in certain circumstances be allocated over time if it is determined that they are likely to be linked to the purchase of fixed assets and still confer a benefit during the investigation period.

(vi) In the case of subsidies expensed as in paragraphs (i) and (iii) no subsidies granted before the investigation period should be taken into account. For subsidies allocated over time, as in (ii), (iv), and (v), subsidies granted prior to the investigation period must be considered.

(b) Appropriate denominator for allocation of subsidy amount

Once the subsidy amount to be attributed to the investigation period has been established, the per unit amount may be arrived at by allocating it over the appropriate denominator, consisting of the volume of sales or exports of a product concerned.

(i) As regards export subsidies the appropriate denominator for allocation should be the export volume during the investigation period, since such subsidies benefit only exports;

(ii) For non-export subsidies the total sales (domestic plus export) should normally be used as the denominator, since such subsidies benefit both domestic and export sales.

(iii) If the benefit of a subsidy is limited to a particular product, the denominator should reflect only sales of that product. If this is not the case, the denominator should be the recipient's total sales.

D. DEDUCTION FROM AMOUNT OF SUBSIDY

1. Only the following may be deducted from the amount of subsidy:

(i) Any application fee, or other costs necessarily incurred in order to qualify for, or to obtain, the subsidy

It is up to the exporter in the country concerned to claim a deduction; in the absence of such a claim accompanied by verifiable proof, no deduction should be granted. The only fees or costs that

may normally be deducted are those paid directly to the government in the investigation period. It must be shown that such payment is compulsory in order to receive the subsidy. Neither the payments made to private parties, e.g., lawyers, accountants, incurred in applying for subsidies, nor the voluntary contributions the governments, for example donations, are not deductible.

(ii) Export taxes, duties or other charges levied on the export of a product to India specifically intended to offset the subsidy

Such claims for deductions should only be accepted if the charges involved were levied during the investigation period, and it is established that they continue to be levied at the time when definitive measures are recommended.

2. No other deductions can normally be made from the amount of subsidy. No allowance can be made for any tax effects of subsidies or for any other economic or time value effect beyond that which is specified in this communication."

F.No 523/5/2005-Cus(TU)

Note: *The principal Rule were published in theGazette* of India in part I, section 3, sub-section (i), vide notification No 1/95-Customs(N.T), dated the 1st January, 1995 vide G.S.R dated the 1 January, 1995.